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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CALVIN BURNEY

and

MITCHELL BURNEY,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Eighth District
Court of Appeals
For Cuyahoga County, Ohio

JAMES R. WILLIS, ESQ.
Attorney for Petitioners
Suite 350, Courthouse
Square Building
310 Lakeside Ave., N.W.
Cleveland, Ohio 44113
(216) 523-1100

QUESTIONS PRESENTED

I

WHETHER DUE PROCESS IS DENIED WHEN A REVIEWING COURT, DESPITE THE LACK OF ANY FACTUAL FINDINGS AND INDEED WITHOUT THE BENEFIT OF ANY FACTUAL BASIS FOR DOING SO, ARBITRARILY IMPUTES A WAIVER OF THE CONSTITUTIONAL RIGHT TO SPEEDY-TRIAL TO THE ACCUSED.

II

WHETHER DUE PROCESS IS DENIED WHERE ISSUES LITIGATED AND RESOLVED AT THE TRIAL LEVEL (IN THE WAKE OF VERY SPECIFIC CONTENDING THEORIES) ARE RESOLVED BY THE APPEALS COURT AGAINST THE ACCUSED ON THE BASIS OF A THEORY (1) THAT WAS NOT FACTUALLY DEVELOPED BY THE PARTIES AT THE TRIAL LEVEL; (2) THAT WAS NOT ARGUED BY THE PARTIES AT THE TRIAL LEVEL; (3) THAT WAS NOT BRIEFED OR ARGUED BY THE PARTIES ON APPEAL AND (4) THAT WAS, IN ANY EVENT, A THEORY THAT MORE PROBABLE THAN NOT WAS NOT EVEN SUSPECTED BY THE TRIAL JUDGE.

III

WHERE THERE IS SOME EVIDENCE SUFFICIENT TO RAISE AN AFFIRMATIVE DEFENSE, THE TRIAL COURT MUST SUBMIT THE ISSUE AS TO WHETHER THE DEFENSE WAS MAINTAINED TO THE JURY.

IV

WHETHER ONE'S CONVICTION (HERE MITCHELL BURNEY'S) ALONG WITH THAT OF HIS CO-DEFENDANT FOR CARRYING THE SAME CONCEALED WEAPON IS SUPPORTED BY SUFFICIENT EVIDENCE WHERE THE PROOF ONLY SHOWS HIS MERE PRESENCE IN THE CAR WHERE THE GUN WAS FOUND.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioners, Calvin Burney

and Mitchell Burney, respectfully pray that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on November 13, 1991 (Calvin Burney) and December 18, 1991 (Mitchell Burney), when the Supreme Court of Ohio denied further appellate review. See Appendices "A" and "C", infra, pp. A-1 and A-17.

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

(1) Fifth Amendment, United States Constitution;

(2) Sixth Amendment, United States Constitution;

(3) Revised Code of Ohio, §2923.12(C)(1);

(4) Revised Code of Ohio,

§2925.03(A)(7);

(5) Revised Code of Ohio, §2945.71(C);

(6) Revised Code of Ohio, §2945.72.

OPINIONS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendix "A" (Calvin Burney) and Appendix "C" (Mitchell Burney) in the Appendix to this Petition, at pages A-1 and A-27.

The Journal Entries of the Ohio Court of Appeals, the judgments to which the petition is directed, are designated Appendix "B", (**Calvin Burney**) at page A-2 and Appendix "D", (**Mitchell Burney**) at page A-28.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court

of Ohio in the case of **State v. Calvin Burney** was entered on November 13, 1991. The judgment of the Supreme Court of Ohio in the case of **State v. Mitchell Burney** was entered on December 18, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1257(3).

STATEMENT OF THE CASE[1]

Calvin Burney and Mitchell Burney, the petitioners in this cause, are brothers. They were jointly indicted, tried and convicted in the Common Pleas Court in and for Cuyahoga County, Ohio. Both were represented by the same attorney. On appeal they were represented by different

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[1] References to the transcript of proceedings will be designated by the prefix "Tr." References to the Appendix to this Petition are designated Appendix " ", p. A-___.

attorneys. The convictions of both were affirmed. This petition primarily deals with issues that are common to both of those individuals. Because of the identicality of these issues, the position was taken that the issues were properly joinable in one Petition as allowed by Rule 12(2), Rules of the Supreme Court of the United States.

The facts relevant to a resolution of the central issues raised by the Petitioners in this cause were sufficiently set forth in the two (2) Opinions rendered below in their separate appeals. See **State v. Calvin Burney, No. 58611** (Appendix "B", infra, p. A-2) and **State v. Mitchell Burney, No. 58815** (Appendix "D", infra, p. A-28).

In **State v. Calvin Burney** the Court wrote:

> [Calvin Burney] was initially indicted December 28, 1987 in Cuyahoga County Court of Common Pleas, criminal case number CR-222830, for events which occurred on November 6 and 13, 1987.
>
> Appellant Burney was arraigned on this initial indictment on January 26, 1988. On July 6, 1988, appellant waived his right to speedy trial. A motion to suppress evidence was filed on August 10, 1988, and was heard and overruled on April 4, 1989. Trial scheduled on March 29, 1989 was continued at both parties request until April 19, 1989.
>
> On April 17, 1989, a second indictment was returned by the grand jury. The charges were raised from drug abuse to drug trafficking. On May 4, 1989, appellant entered a "plea in bar" based on denial of a speedy trial. On May 8, 1989, appellant was arraigned.
>
> A jury trial was commenced

> on August 14, 1989. On August 25, 1989, the jury returned a verdict of guilty as to all counts and the gun specification.
>
> On September 14, 1989, the trial court sentenced appellant to serve a term of three years to fifteen years. All terms were to run concurrent.
>
> On October 2, 1989, the initial indictment was dismissed as the result of a nolle prosequi.

State v. Calvin Burney, Appendix "B," infra pp. A-7 to A-9.

In commenting on this identical factual scenario, a different panel of the Court of Appeals (that included, as one of the Judges, the author of the Opinion in the **Calvin Burney** case, quoted from above) wrote that:

> The original indictment was brought against appellant [Mitchell Burney] on December 28, 1987 as a result of the November 6 and 13, 1987 events.

Appellant's arraignment of this indictment occurred on January 26, 1988. Appellant waived his right to a speedy trial on July 6, 1988. On August 10, 1988, a motion to suppress evidence was filed, said motion being heard and overruled by the trial court on April 4, 1989. Both parties thereafter requested that the trial scheduled for March 29, 1989 be continued; whereupon a pretrial was scheduled for April 19, 1989.

The Cuyahoga County Grand Jury returned the second indictment on April 17, 1989 in which the initial drug abuse charges were raised to drug trafficking. On May 4, appellant entered a "plea in bar," seeking a dismissal of the indictment based on denial of a speedy trial. Appellant pled not guilty at his arraignment on May 8, 1989. The trial court subsequently nolled two counts of the indictment.

Trial by jury commenced on August 14, 1989 on the remaining eight counts. The jury returned a verdict of guilty as to these eight counts on August 25, 1989.

State v. Mitchell Burney, Appendix "D", pp. A-33 to A-36.

Of significance here, apart from the clashing calculations on identical facts so evident in both of the **Burney** Opinions are two critical circumstances. One, the issue deemed dispositive and resolved by the Appellate Court, in both Burney appeals, had not even been considered by the parties or the trial Court. Next, the specific speedy-trial issue resolved by the Court of Appeals was not briefed, or even argued orally, by the parties in the Court of Appeals or at the trial level. The reason this is so could not be clearer.

Simply put, the resulting ruling is believed to be a product of an apparent unwillingness to fully

vindicate the rights of these Petitioners because they were charged with serious drug offenses.

This point is well made when one considers that the only issue presented to the trial Court and resolved against the Burneys by the trial Judge had simply asked: whether the rule announced by our Supreme Court in **State v. Adams, 43 Ohio St. 3d 67 (1989)**, applied. The Opinion of the trial Judge, when read in the light of the arguments made, distills into a conclusory determination that the **Adams** rule did not apply. See Appendix "E", infra, p. A-67.

In the Court of Appeals, the State sought to defend the trial Court's ruling which can only be read as an adoption of the argument made by

the State and as a specific rejection of the arguments made by the defense.[2] Again, the only issue addressed by the parties in their Briefs (and for that matter in the oral arguments) dealt with whether the speedy trial waiver, that had admittedly been exercised by these Petitioners with reference to the charges made in their original indictment, could be applied to new, different and more serious charges made in the subsequent indictment.

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[2] Here the Record shows the Court, after listening to the State argue that these Petitioners had waived their speedy trial rights with reference to the new charges as well (Tr., 14-16), summarily declared that he "underst[ood] the arguments on both sides ... underst[ood] the law." And, then proceeded to "over-rule the Motion" to Dismiss (id., at p. A-67 [Tr., p. 18]). Nothing further was said by the Court.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

This case, perhaps moreso than any that has ever been presented to the Court, shows clearly what has to be a problem with the way criminal convictions are now being routinely reviewed. For although the two separate resolutions, with which we are here concerned, dealt with the identical speedy-trial issue, the six Appellate Judges who were involved in these two appeals expressed, or joined in, the Opinions that are totally irreconcilable. This fact alone should command the attention of this Court.

In addition, the point should also be made that none of the bases relied on for affirmance were

considered by the parties at the trial level. Indeed, it is also a fact that the sole basis relied on by both panels, for the affirmances, were neither briefed or argued by the parties. Indeed, the basis relied on was not even mentioned to the trial Judge or by the trial Judge.

The ultimate points made in Arguments I and II below are really dispositive of the speedy trial issues in this case. Indeed, the arguments magnify a need for an awareness that regardless of the facts and even the law (in the drug case) reviewing Courts, especially those in Ohio, are simply most willing to look the other way in search of a basis for affirming a conviction.

Indeed, if it were otherwise,

rather than ambush these Petitioners (on the basis of the resolution of an issue that was not confronted by the trial Court or raised by the parties in their arguments), by substituting its own indefensible rationale, the Court should have vindicated the speedy trial rights of these Petitioners. Stated another way, it could not be clearer that the Court of Appeals (in both of the appeals for which review is being sought) simply substituted for the trial court's flawed resolution the ruling they undoubtedly would have made if they had been acting in his stead.

In our judgment, it was neither the function or the prerogative of these Appellate Courts to make the factual findings relied on to resolve

the speedy trial issue against these Petitioners. The fact that this was done outside the issues specifically discussed at the trial level by the parties and the trial Judge (Tr., 14-18) and outside the issues discussed and argued (in the Appellate Briefs) by the parties is bad enough. What makes it worse is that the State Appeals Court did not view the position imputed by it to the State as having been waived. The significance of this circumstance lies in the fact that not unlike Appellate Courts everywhere, Ohio's Appellate Courts have never hesitated to view a position taken by the accused as having been waived if not seasonably raised and resolved at the trial level. See **State v. Gary Johnson**

(II), 46 Ohio St. 3d 96, 545 N.E. 2d 636, at 642 (1989).

ARGUMENT NO. I

DUE PROCESS IS DENIED AN ACCUSED WHEN A REVIEWING COURT, DESPITE THE LACK OF ANY FACTUAL FINDINGS AND INDEED WITHOUT THE BENEFIT OF ANY FACTUAL BASIS FOR DOING SO, ARBITRARILY IMPUTES A WAIVER OF THE RIGHT TO SPEEDY-TRIAL TO AN ACCUSED.

In **Calvin Burney** the Court of Appeals recognized that in the second indictment returned in this case "the charges [... had been] raised from drug abuse [a fourth degree felony] to drug trafficking (Appendix "B", p. A-8). Similarly in **Mitchell Burney** the Court again, and likewise, recognized that "the charges were raised from drug abuse (a fourth degree felony) to

drug trafficking" (Appendix "D", p. A-34).

Postured by the fact that indeed the charges added in this second indictment were far and away more serious charges than those charges made in the earlier indictment, the petitioners in an appropriate Motion took the very specific position that this situation was controlled by **Adams**. This position was that the speedy trial waiver applicable to the original indictment could not, in the wake of **State v. Adams**, be imputed to the subsequent indictment. Since the Appellate Court, in both of these appeals agreed **State v. Adams** applied, that should have ended the matter. But such was not to be. As the Court in both instances proceeded to do just

what they concluded **State v. Adams** barred them from doing.

Here, it is worth repeating, the trial Court in denying petitioners' speedy-trial challenge made absolutely no findings of fact. Indeed absolutely nothing was said by the trial Court that can even be suggested as forming a basis for imputing to the trial Judge the factual findings required to support the calculations made in the Appellate Court's Opinions.[3]

The significance of the absence of findings is evident from a reading

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[3] Granted as shown above Ante, pp. 6-7 & 7-8, the separate panels, of the Court of Appeals, could not come up with the same final figures. However, both panels did agree that more than six hundred (600) days elapsed between the original indictment and the trial.

of the Concurring Opinion in **Mitchell Burney**, Appendix "D", infra, p. A-58. In this Opinion, Judge Spellacy, undoubtedly recognized the impact of the fact credited by his colleagues (and the Court itself in Calvin Burney) that the "speedy trial waiver[s] exercised [by Mitchell Burney] as to his initial indictment does not apply to the latter indictment pursuant to **State v. Adams, 43 Ohio St. 3d 67**" Ibid. Simply put, this Judge was obviously of the opinion that these convictions really should be reversed unless another basis for affirmance existed. Thus he reached the conclusion that **Adams** did not apply -- a conclusion that is clearly at odds with the position taken by five of his colleagues on the

Court of Appeals.

Having said that it is of significance to note that in **Calvin Burney** the Court of Appeals in addressing the specific issues before it (as framed by the trial Judge's ruling and the parties both at the trial level and in the appellate Court) fully endorsed the position taken by the Petitioner, Calvin Burney. In its ruling on this specific point, which can only be viewed as an outright rejection of the positions taken by the trial Court on this issue and by counsel opposite (both, at the trial level and on appeal), the Court in clear and unambiguous language wrote that:

> [A]pplying the [Ohio Supreme Court's] logic to the Speedy trial waiver, herein, the original waiver does not

apply to the subsequent re-indictment charges.

State v. Calvin Burney, Opinion, Appendix "A", infra at p. 6. This very precise ruling was then adopted without reservation by the majority in the **Mitchell Burney** Opinion. There the Opinion, in language that rather compellingly articulates formidable support for our thesis, stated:

> The Sixth Amendment to the United States Constitution guarantees a defendant a right to a speedy trial. Section 10, Article I of the Ohio Constitution provides a similar provision.
>
> A defendant's right to a speedy trial is codified in R.C. [of Ohio, §] 2945.71. This statute was enacted as:
>
> > "'*** a rational effort to enforce the constitutional right to a public speedy trial of an accused ... and shall be strictly

> enforced by the courts of this state.'"

State v. Packay (1980), 64 Ohio St. 2d 218, syllabus.

* * *

The Ohio Supreme Court in State v. Adams, supra, addressed the issue of whether a defendant's waiver of his right to a speedy trial as to an initial charge acts as a waiver of that same right to a subsequent charge. The court held that:

> "'*** when an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver."

State v. Mitchell Burney, Appendix "D", pp. A-37, to A-38. (Emphasis

supplied.)

The fact that the Court in **Mitchell Burney** specifically cited the **Calvin Burney** Opinion (id., at A-40) mightily punctuates the position being urged by these Petitioners. Actually, it does even more than that. For what is shown is not merely a frightening unwillingness to follow the force of the only conclusion that could possibly have resulted from the premises relied on (doubtless because this was a serious drug case), the Court simply reached out and artificially created, out of whole cloth, a reason to avoid reversing a drug conviction. The fear here has to be that of being regarded as having committed some sort of treason -- i.e., that is by giving aid and

comfort to the enemy in the war on Drugs.

In overcoming **Adams** it is significant to note, as shown above, the separate panels came up with a literal hodge-podge of calculations. See ante, pp. 6-8. At most these calculations can only be said to have been the ones the particular Judges would have made if they had been the fact finder.[4] But, of course, by law that task is given to those who function at the trial level -- in this instance it was the trial judge. On the other hand, while clearly the calculations cannot be reconciled, the critical fact here is they were made

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[4] What makes these calculations even more farcical, if not hilarious, is that one of the Judges agreed with both calculations.

without any input by the parties. Still the grim fact remains (as argued below) that once the Court agreed the waivers executed by the Burneys could not apply to the new charges, that should have ended the speedy-trial discussion in their favor.

Now counsel opposite (in his response papers) will not even attempt to explain how our Court of Appeals could jump from the categorical conclusion that the waivers executed as against the original charges could not be applied to the subsequent charges to the conclusion that calculations which related to the tolling of the original speedy-trial clock (that ran on the original charges) could be made in spite of this ruling to apply full strength to

the new charges made in the subsequent indictment.

In our judgment, any failure on the State to address this issue should be viewed as a cop-out -- pure and simple. The efficacy of this point will be magnified for the Court, if as occurred at the Ohio Supreme Court level where further appellate review was sought, counsel opposite did not even credit the existence of **State v. Adams**.

ARGUMENT NO. II

WHERE ISSUES ARE LITIGATED AND RESOLVED AT THE TRIAL LEVEL IN THE WAKE OF VERY SPECIFIC, CONTENDING THEORIES (WHICH THEORIES WERE THE ONLY ONES BRIEFED AND ARGUED BY THE PARTIES IN THE APPEAL), DUE PROCESS IS DENIED WHEN THE APPELLATE COURT RESOLVES THE

APPEAL AGAINST THE ACCUSED ON THE BASIS OF A THEORY (1) THAT WAS NOT FACTUALLY DEVELOPED BY THE PARTIES AT THE TRIAL LEVEL; (2) THAT WAS NOT ARGUED BY THE PARTIES AT THE TRIAL LEVEL; (3) THAT WAS NOT BRIEFED OR ARGUED BY THE PARTIES ON APPEAL AND (4) THAT WAS, IN ANY EVENT, A THEORY THAT MORE PROBABLE THAN NOT WAS NOT EVEN SUSPECTED BY THE TRIAL JUDGE.

Here it should be emphasized the State only contended, at the trial level, that because the defense had a sufficient awareness of the additional charges that were made in the second indictment this fact put the State's filing of the additional charges outside the ambit of **State v. Adams, 43 Ohio St. 3d 67 (1989).**

In the appeal taken by Calvin

Burney, one of the petitioners herein, the precise argument made by counsel opposite, which resulted in the trial court's summary denial of the Motion to Dismiss, was that:

> We are next confronted with the fact that the appellant was treating both cases as the same case during the period of time prior to and up to the time of trial in CR 238069.
>
> First, the bond in CR 222830 was applied to CR 238069. Second, Appellant's [trial] counsel moved the court prior to trial to incorporate the motion to suppress evidence filed in CR 222830 into the proceedings in CR 238069. (T. 28-29). Third, Appellant's [trial] counsel was satisfied with the discovery response provided by the state in CR 222830 and agreed that it be incorporated into the proceedings in CR 238069. (T. 32-33). This point is especially important in light of the Adams decision offered by appellant.

See, Answer Brief, filed by the State in **State v. Calvin Burney**, Case No. 58611, at pp. 11-12.

Here it should be noted that in the appeal of Mitchell Burney, the other petitioner herein, the State made virtually the same non-sensical argument. Specifically it was said in that appeal:

> The record reflects that the State's discovery response and Bill of Particulars in CR 222830 was filed on March 16, 1988. Appellant's waiver of speedy trial occurred afterwards on July 6, 1988. **By accepting the discovery as being complete in CR 238069 as it was provided in CR 222830**, the appellant was indicating that he was in fact fully apprised and informed of the waiver of speedy trial. Appellant always knew the essential facts of the State's case based upon the events of November 6th and 13th, 1987, and that never changed.

Answer Brief, filed by the State in **State v. Mitchell Burney**, Court of Appeals No. 58815, at p. 12.

Postured then by these considerations it should suffice to simply note the elementary rule of appellate practice that a reviewing court will not alter the theory under which facts are developed and issues are resolved at the trial level. Having said that, it is here being submitted that the Appellate Court's recitation of the facts is quite sufficient to make our point. Here the Court wrote:

> ... a knowing and intelligent waiver cannot be made until all the facts are known by the accused, which includes knowing the nature of the crime he is charged with.

Opinion, Appendix "B", p. A-9.

(Citing **Adams**, at 70.) The point here being that having reached this correct conclusion, the Court of Appeals then simply conjured up a completely indefensible rationale to justify failing to address the issues as framed by the parties. The Court then proceeded to affirm the conviction on theories that, in addition to being invalid and untenable, were simply not addressed by the parties.

Next, we submit it is most unfair for the reviewing court to have considered and resolved these appeals on the basis of issues that were not considered by the parties or the trial Court. See, **United States v. Check, 582 F.2d 668, at 683 (2d Cir. 1978).** On this point consider the rather sagacious remarks made by Justice

Cardoza in **Shepard v. United States, 290 U.S. 96, 102-103 (1933)**. There it was said, for the unanimous Court (in a case that really focuses on an aspect of the false rationale our Appeals Court would impute to our trial Judge), that a "trial becomes unfair if facts developed at a trial are used by an appellate court for different purposes, purposes that arguably were unavowed and unsuspected." Id., at 102-103. Also see **United States v. Hannah, 584 F.2d 27 (3d Cir. 1978)**, where the Third Circuit, while considering an appeal by the Government, took the position that:

> An appellate court may properly review a criminal case only on the theory submitted to the jury at trial by the prosecution.

Id., at 32.

All this seems to verify the ultimate position taken in the **Check** decision, and contended for here, that there "is venerable precedent" that calls for disregarding the unseasonable advancement of alternative theories to salvage a conviction. Clearly this occurs when the grounds advanced by the parties in the trial, or even on appeal, differ markedly, as they did here, from those relied upon by the appellate court. Cf., **United States v. Check, 582 F.2d 668, 681 (2d Cir. 1978).**

This cause then furnishes the Court an apt opportunity to re-invigorate the principle that forecloses any appellate use of Shepard-type, post hoc, justifications

or rationales and prevent them from not only being used by the parties, but from being used (as was done here) by appellate courts to literally ambush those who seek to appeal their convictions. Simply put, this Court should fully and unequivocally credit, endorse and ratify this "venerable precedent" that bars Appellate Courts from creating facts to support theories not even considered in the lower courts. And, most assuredly were not relied on by such courts.

In our judgment, this Court should conclude that inasmuch as the prosecution's trial court contentions were expressly adopted by the trial Judge, the reviewing court was required to resolve the appeal on the basis of the challenge leveled against

that ruling. If not, then at the very least the Court should not have proceeded to resolve the appeal on the basis of factual findings that were not made at the trial level. This is particularly so where no notice is given to the parties that the Court intended to disregard the arguments made by the parties.

In our judgment, a repeat of the failure on the State to address the issues as framed by the parties should be viewed as a cop-out -- pure and simple. The efficacy of this point will be magnified for this Court, if as occurred at the Ohio Supreme Court level, counsel opposite fails to explain why **State v. Adams** does not control this situation. This we contend is significant since his

position at the trial level and in the Court of Appeals was that **Adams** simply did not apply. In our judgment, with that position having been rejected on appeal in our favor, it is not surprising that the State has really taken a wait and see attitude.

Distilled, what we are contending in this segment of the petition is that due process was denied when the reviewing court totally disregarded the dispositive contentions made to and resolved by the trial court, which contentions were the only ones argued and briefed on appeal by the parties. It is also being contended that due process was violated when the court summarily resolved these appeals on the basis of the court's own factual determinations that were made without

any input from the parties.

In further emphasizing the points we are here contending for, it is significant that in his concurring Opinion in **State v. Mitchell Burney**, Appendix "D", infra, at p. A-58 through A-59, Judge Spellacy (doubtless because the flaw in the majority's ultimate rationale was immediately apparent to him) chose to distance himself from the majority's holding that **Adams**[5] did indeed apply to the additional charges made in the second indictment.

The bottom line then is that

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[5] The State's position in the **Mitchell Burney** appeal distilled into a serious opposition to what was regarded as Mitchell Burney's "assertion that **State v. Adams** is controlling". Brief of Appellee, filed in **State v. Mitchell Burney**, at p. 13.

obviously this case does not present the speedy-trial issue wrapped in a very neat package. Indeed, although we fully endorse the Appellate Court's conclusion that **State v. Adams** applied to bar these petitioners from being deemed to have waived their speedy trial rights, we seriously contest the ultimate resolution made by that Court on this issue. In our judgment, the positions taken by the Court of Appeals as to both of these petitioners is really indefensible. Here we repeat the point made in **United States v. Hannah, 584 F.2d 27 (3d Cir. 1978)**, when the Court ruled that:

> An appellate Court may properly review a Court case only on the theory submitted to the jury at trial by the prosecution.

Id., at 32.

Clearly under **Hannah** the fact that the State in our case contended at the trial, and likewise in the Court of Appeals, that **State v. Adams** did not apply to the speedy-trial issue in this case is most significant. See Tr., pp. 14-16.

ARGUMENT NO. III

WHERE THERE IS SOME EVIDENCE SUFFICIENT TO RAISE AN AFFIRMATIVE DEFENSE, THE TRIAL COURT'S OBLIGATION IS TO SUBMIT THE ISSUE TO THE JURY.

The point here that should be emphasized is that it is only where there is no evidence to support a particular defense that a failure to instruct the jury thereon can be justified. With this as a given the Appellate Court's conclusion that even

if, as petitioner Calvin Burney testified, he had the "pistol for the opening and closing of his lawful fish store business" (Opinion, Appendix "B," at p. A-23), this fact could not be used "to justify his gun possession in the middle of the afternoon miles away from his store" (ibid), becomes still another major flaw in the trial that led to the conviction of Calvin Burney.

Here we start by noting that a jury is simply not bound to follow what appears to Judges to be simple logic. This being so, the fact that the petitioner, Calvin Burney (with reference to this issue) sought, as was his right, to have his guilt determined, not by members of the government but rather by his peers, is

a matter of considerable importance here. This fundamental right is particularly important in drug cases where it is obvious the judiciary (nationwide) has been elicited to do more than its share in the "war on drugs". Indeed, Courts are now being asked to actually dilute rights that were once held to be sacred and inviolate. The real tragedy in all this is yet to come. For it is our belief that there are no rights that are beyond the power of our Courts to destroy in the name of law and order.

In any event, it should be emphasized that the asserted justification for the trial court's refusal to give the requested

instruction[6] was simply imputed to him by the Court of Appeals. The fact that this was done in a manner that does not accommodate the position taken by the trial court (Tr., 831) or the parties in their Briefs, is not merely a part of the problem, it is **the** problem.

Here it seems clear the issue was postured for the Court of Appeals by the appellant's request for the instruction, which was specific enough (Tr., 831-836). The State's insubstantial position, in the Court

---

[6] Of no mean significance here, whatever the reason was for the trial court's disinclination to give the requested instruction certainly was not for the reasons asserted by the Court of Appeals. In any event, even if it had been the basis for the trial court's refusal, as shown in this argument it would have been insufficient.

of Appeals, was that there was "no justification offered by the Appellant as to why he was armed ... on his way to ... [a supplier].... [N]o testimony of other merchants being robbed in that neighborhood; in sum, no justification as to why a prudent person in the appellant's position as a business owner would go armed at that time and place." (Answer Brief, filed in The Court of Appeals, at p. 17.)

Obviously the position taken by the Court of Appeals cannot be defended. And, just as surely it is a fact that the issue rightly should have been submitted to the jury.

The upshot of the contentions made as to this issue is that if indeed the gun was lawfully possessed,

then the effect of such a determination on the jury's verdict simply cannot be calculated. Also we can credit the fact that if nothing else, it seems clear enough the jurors' questions concerning the gun would have been far more difficult to resolve if the requested instruction had been given. (See Tr., pp. 936, et. seq.)

In summary then, what is being contended here is that the trial court's failure to instruct the jury on the special, stability defense relative to this petitioner's possession of the gun translates into a due process violation. This follows because there is really no way to characterize the unavoidable effect of this omission from the charges

actually given except to agree that this failure translates into the Court having directed a verdict against this petitioner on this issue. See **Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967).**

Clearly then, if Calvin Burney was entitled to the charge requested, he was surely shortchanged by the trial court's failure to do so. So postured, it would then follow, as we contend, there was a due process failure in his conviction. This same failure again surfaced in the Appellate Court's Opinion, which validated these convictions and sought to justify its various positions by resort to false reasoning patterns.

ARGUMENT NO. IV

One's Conviction Along With A Co-Defendant For Carrying A Concealed Weapon, Where There Is Only One Gun Involved, Is Not Supported By Sufficient Evidence Unless The Proof Shows More Than The Mere Presence Of The Gun In The Car In Which Both Were Occupants.

The issue as to petitioner, Mitchell Burney's, guilt on the weapons charge in the first instance was thoroughly intertwisted with the defense put forth by his co-defendant at the trial, Calvin Burney (the other petitioner here). Calvin Burney's defense was, as shown and argued above, that his possession of the gun was lawful. Indeed it was, if his proof established the defense provided

by R.C. of Ohio, §2923.12(c)(1).

Since the Court refused to instruct the jury on that issue, the defense was not properly presented to the jury. In any event, if the petitioner was entitled to any benefits that may have inured to him from such a charge, then to the extent the instruction should have been given he was denied due process.

Given the fact that Mitchell Burney testified he was unaware of the presence of the gun in the car, and Calvin admitted the gun was in his exclusive possession, and that he was justified in having the gun for his protection, the issue clearly is one that cannot be resolved on the basis used by the Courts below.

It is for this reason that our

cause should be reviewed in its entirety by the Court. And, this to the end that the petitioners' guilt can be determined in the light of fundamental criteria.

CONCLUSION

The critical speedy-trial issue in this effort to appeal turns on the fact that the Sixth Amendment to the United States Constitution provides the ultimate right that must be accommodated in any resolution. This idea was well stated by the Ohio Supreme Court in **State v. Adams, 43 Ohio St. 3d 67 (1989).** There our Supreme Court recognized that while this Supreme Court had not fixed the "mandatory time periods within which the State must bring an accused to trial, 'the States ... are free to

prescribe a reasonable period consistent with constitutional standards'...." Id., at 68, citing **Barker v. Wingo, 407 U.S. 514, at 523.**

Utilizing this holding from **Barker v. Wingo**, as a premise for what we deem to be the dispositive ruling in our case as well, the Ohio Supreme Court then held that the provisions of R.C. of Ohio, §2945.71 (which implemented the speedy trial rights of those accused of felony crimes in this State) "are mandatory and must be strictly complied with" (ibid).

This being so, the date of the arrest (i.e., November 13, 1987) triggered these petitioners' speedy-trial rights as to those charges that were first made in the second indictment -- the one on which these

petitioners were ultimately convicted. Thus it could not be clearer that none of the waived time, that delayed the trial of the charges in the first indictment, could be used to stop the speedy-trial clock on the additional charges. Since the clock on these charges started on the day of the arrest, ran unabated until May 4, 1989, when these petitioners filed their Pleas in Bar, the required conclusion here is really inescapable.

The State will again (as it did in defending the Ruling made by the appeals Court) simply ignore the inconfutability of our contention that the fact-dependent findings underpinning the Appellate Court's resolution (of the speedy trial issue) was not even capable of being reliably

determined on the basis of the trial Record. This follows because the Record itself, as it now stands, is simply barren of the facts necessary for any reliable resolutions of the Speedy Trial issues in this appeal.

Given the inconfutability of our analysis of the speedy-trial issue in this cause, it is quite easy to understand the position taken by Judge Spellacy in **Mitchell Burney**. [7] The upshot of this petition is that these convictions can only be validated if

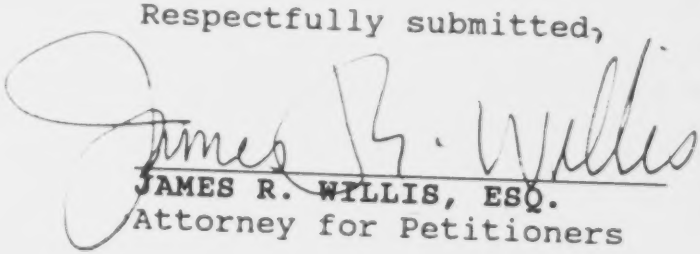
---

[7] Undoubtedly Judge Spellacy recognized, as this Court surely will, that none of the time properly excluded from the running of the speedy trial clock with reference to the charges in the original indictment could be excluded from the charges made in the second indictment since there additional charges "aros[e] from the same set of circumstances" involved in the original indictment **State v. Adams, 43 Ohio St. 3d, at 69.**

indeed, and in fact, **Adams** is not controlling and the views expressed in both Burney Opinions to the effect that it was applicable are wrong -- dead wrong.

While the speedy-trial issue dominated the arguments made, the other issues discussed are like matters of serious concern to the cause of justice in this case. Hence, should likewise be reviewed and ultimately reversed.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioners

91-1323

Supreme Court, U.S.
FILED
FEB 11 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CALVIN BURNEY

and

MITCHELL BURNEY,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
To The Eighth District
Court of Appeals
For Cuyahoga County, Ohio

JAMES R. WILLIS, ESQ.
Attorney for Petitioners
Suite 350, Courthouse
Square Building
310 Lakeside Ave., N.W.
Cleveland, Ohio 44113
(216) 523-1100

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THE SUPREME COURT OF OHIO

1991 TERM

To wit: November 13, 1991

State of Ohio, Appellee,	:	Case No. 91-1600
v.	:	E N T R Y
Calvin O. Burney, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James R. Willis.

(Court of Appeals No. 58611)

THOMAS J. MOYER
Chief Justice

APPENDIX "A"

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 58611

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	
-vs-	:	JOURNAL ENTRY
	:	AND OPINION
CALVIN O. BURNEY	:	
	:	
Defendant-appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	JUNE 6, 1991
CHARACTER OF PROCEEDING	:	Criminal Appeal from Common Pleas Court No. CR-238069
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION:		_____

APPEARANCES :

For Plaintiff-Appellee: STEPHANIE TUBBS JONES
Cuyahoga Cty. Pros.
Justice Center,
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant: David L. Doughten,
Walsh & Doughten Inc.
2000 Standard Building
1370 Ontario Street
Cleveland, OH 44113

APPENDIX "B"

MATIA, P.J.:

In the instant case, defendant-appellant, Calvin Burney, appeals the verdict of the Cuyahoga County Court of Common Pleas which found Burney guilty of drug trafficking pursuant to R.C. 2925.03, R.C. 2925.13, R.C. 2925.11, R.C. 2923.12 and R.C. 2923.24. In his timely appeal, appellant argues that the court violated his statutory right to a speedy trial, the sufficiency of the evidence and the trial court erred in its jury instruction in the re-indictment which gave rise to these charges.

I. THE FACTS, GENERALLY

The drug incidents occurred on November 6, 1987 and November 13, 1987. On both dates, police

detectives, pursuant to an on-going investigation which involved a joint task force operation between ATF agents and the Cleveland Police Department Narcotics Unit (Tr. 78), observed appellant and his brother and co-defendant, Mitchell Burney conduct drug transactions.

On November 6, 1987, the investigation team permitted appellant Calvin and co-defendant Mitchell to sell one ounce of cocaine to Special Agent Ron Carter without an arrest. The surveillance team monitored the body wire worn by Agent Carter, (Tr., 83-84).

On November 13, 1987, Agent Carter again prearranged a drug buy with William Atkinson (the middle man). Agent Carter went to Atkinson's

residence at 3340 East 113th Street. (Tr., 95.) Once there, Atkinson told Agent Carter "*** he had good news and bad news for me. He stated the bad news was that there was only going to be three ounces of cocaine, instead of four, because his sources didn't have time to go to the stash house. He stated that the good news was that it would still be $1,200.00 an ounce, that we wouldn't have to go anywhere, that the transaction would take place there." (Tr. 95).

Agent Carter was at Atkinson's address for one and one-half hours. During this time, Atkinson made phone calls and paged his suppliers to hurry the deal. (Tr. 126.)

Agent Carter was paged by his office and told to leave the

residence. As he was leaving, the police units converged on the residence and arrested Atkinson, Carter and Carter's informant. (Tr. 99.)

Prior to these events, the white BMW containing appellant Calvin and co-defendant Mitchell Burney was being observed by the other members of the task force. The BMW was stopped by the task force at 116th Street and Melba, three blocks from Atkinson's residence on 113th Street. Appellant Calvin, who was driving, attempted to back the BMW out of the blockade and had to be ordered to stop. (Tr. 275-276.)

A loaded nine millimeter Browning automatic pistol was found between the front seats. (Tr. 277.) Three ounces

cocaine was confiscated from the pocket of co-defendant Mitchell. A pager was found on appellant Calvin. The pager had a liquid crystal display and William Atkinson's phone number was stored as the most recent caller. (Tr. 287, 288.)

II. THE CASE

The appellant was initially indicted December 28, 1987 in Cuyahoga County Court of Common Pleas, criminal case number CR-222830, for events which occurred on November 6 and 13, 1987.

Appellant Burney was arraigned on this initial indictment on January 26, 1988. On July 6, 198, appellant waived his right to speedy trial. A motion to suppress evidence was filed on August 10, 1988, and was heard and

overruled on April 4, 1989. Trial scheduled on March 29, 1989 was continued at both parties request until April 19, 1989.

On April 17, 1989, a second indictment was returned by the grand jury. The charges were raised from drug abuse to drug trafficking. On May 4, 1989, appellant entered a "plea in bar" based on denial of a speedy trial. On May 8, 1989, appellant was arraigned.

A jury trial was commenced on August 14, 1989. On August 25, 1989, the jury returned a verdict of guilty as to all counts and the gun specification.

On September 14, 1989, the trial court sentenced appellant to serve a term of three years to fifteen years.

All terms were to run concurrent.

On October 2, 1989, the initial indictment was dismissed as the result of a nolle prosequi.

On October 13, 1989, appellant brought this timely appeal from the within verdict and sentence.

III. ASSIGNMENT OF ERROR NO. I

> "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE CHARGES THEREBY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND HIS STATUTORY RIGHT TO SPEEDY TRIAL UNDER R.C. 2945.71 AND 2945.73."

Appellant, in his first assignment or error argues that the trial court erred in denying his motion to dismiss the second indictment. Specifically, appellant

argues that his waiver of his right to a speedy trial of the initial indictment did not constitute a knowing and intelligent waiver of such right as to the second charge.

This assignment of error is not well taken.

ISSUE: WHETHER SPEEDY TRIAL WAIVER AS TO THE ORIGINAL CHARGE CAN BE CONSIDERED AS A KNOWING AND INTELLIGENT WAIVER AS TO THE SECOND CHARGE

Appellant Burney correctly relies on State v. Adams (1989), 43 Ohio St. 3d 67 to assert his contention that he did not waive his right to a speedy trial as to the second indictment arising out of the same facts handed down on April 17, 1989 by the Grand Jury. The Ohio Supreme Court held in Adams, "Nevertheless, we hold that when an accused waives the right to a

speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver." Adams, supra at 70.

The court reasoned that the appellant's waiver of his right to a speedy trial as to the original indictment could not be construed as a knowing and intelligent waiver to a new charge that could involve different defenses at trial. The court stated: "Thus, a knowing and intelligent waiver cannot be made until all the facts are known by the accused, which includes knowing the nature of the crime he is charged with." Adams, supra. Therefore, applying the court's logic to the

issue of speedy trial waiver, herein, the original waiver does not apply to the subsequent re-indictment charges.

ISSUE: WHETHER APPELLANT WAS BROUGHT TO TRIAL WITHIN 270 DAYS

R.C. 2945.71(C) provides in relevant part:

"A person against whom a charge of felony is pending:

"***

"(2) shall be brought to trial within two hundred seventy days after his arrest."

Appellant Burney was arrested on November 13, 1987. He was brought to trial on charges resulting from the new charges on August 14, 1989. Approximately 630 days elapsed between the date of appellant's original arrest and the date of his trial arising from the second indictment. This clearly exceeds the statutory intent of R.C. 2945.71(C) unless R.C.

2945.72 tolls the time.

Thus, next we must examine whether that time was extended (tolled) for any reason pursuant to R.C. 2945.72.

"R.C. 2945.72 provides:

> "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only be the following:
>
> "***
>
> "***
>
> "(D) Any period of delay occasioned by the neglect or improper act of the accused;
>
> "(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;
>
> "****
>
> "(H) The period of any

continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion;

"***."

ISSUE: THE FACTS RE ANY AND ALL TRIAL DELAYS WHATSOEVER

The record indicates that on February 9, 1988, the pretrial was reset to February 17, 1988. Then again on February 22, 1988, pretrial was reset again until March 18, 1988. However, the record does not indicate whether these continuances were made at the defendant's request, so in effect, these entries will not toll the time.

However, on August 10, 1988, defendants filed a motion to suppress evidence. The court ruled on this motion on April 4, 1989. Herein 234

days were tolled at defendant's request. Trial scheduled on March 29, 1989 was continued for April 19, 1989 at the request of both the prosecutor and defense. Therefore, an additional 21 days was tolled at the defendant;s request.

On May 4, 1989, defendant made a plea in bar for a motion to dismiss for lack of speedy trial waiver. The court ruled on this motion on August 28, 1989. Consequently, 114 days were tolled for the within motion.

Historical Date and Activity	Elapsed Chargeable Time
1) November 13, 1987 - appellant arrested and incarcerated in lieu of bond	
2) November 16, 1987 - appellant released on bond	2 x 3 = 6 days
3) August 10, 1988	

- appellant filed a motion to suppress

4) April 4, 1989 - court denied motion to suppress — 234 days

5) March 29, 1989 - trial continued at defendant's and prosecutor's request to April 19, 1989 — 21 days

6) May 4, 1989 - appellant made a plea in bar for motion to dismiss for lack of speedy trial waiver

7) August 28, 1989 - trial court denied motion to dismiss — 114 days

TOTAL ELAPSED CHARGEABLE TIME 375 days

ISSUE: APPELLANT WAS NOT DENIED RIGHT TO SPEEDY TRIAL

The aggregate number of days tolled at defendant's request for these motions and continuances were 375, thus extending the statutory period. See, State v. Bickerstaff (1984), 10 Ohio St. 3d 62, 67. (Therefore, the time that elapsed

while the motions were pending is not included for purposes of R.C. 2945.71.) When these continuances and motions are subtracted from the total aggregate number of days, which is 630; the resulting days equal 255 and fall within the permissible statutory period of 270 days.

Accordingly, although appellant applies State v. Adams, supra, correctly, when this court extends the statutory time pursuant to R.C. 2945.72, the actual time pending before appellant was brought to trial falls within the statutory limits of R.C. 2945.71.

Accordingly, assignment of error I is without merit.

IV. ASSIGNMENT OF ERROR NO. II

"THERE IS CONSTITUTIONALLY INSUFFICIENT EVIDENCE TO

SUSTAIN APPELLANT'S CONVICTION FOR TRAFFICKING IN DRUGS, R.C. 2925.03(A)(7) AND POSSESSION OF DRUGS GREATER THAN THREE TIMES THE BULK ON NOVEMBER 13, 1987."

Appellant, in his second assignment of error argues that there was insufficient evidence to sustain his conviction for trafficking in drugs, R.C. 2925.03(A)(7) and possession of drugs greater than three times the bulk on November 13, 1987. Specifically, appellant argues that the evidence shows only that he was driving an automobile with his brother as a passenger, and that there is no evidence that he knew that his brother had cocaine in his possession.

This assignment of error is not well taken.

ISSUE: WHETHER SUFFICIENT EVIDENCE SUSTAINS CONVICTION

The standard for reviewing a conviction based upon the sufficiency of the evidence is found in the syllabus of State v. DeHass (1967), 10 Ohio St. 2d 230:

> 1. On the trial of a case either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.
>
> 2. A reviewing court may not reverse a judgment of conviction in a criminal case where the record shows that a verdict of guilty was returned by a jury on sufficient evidence and where no prejudicial error occurred in the actual trial of the case or in the instructions given the jury by the court.

Herein, a review of the record supports the trial court's decision that there was sufficient evidence to sustain the trafficking and possession

conviction of appellant.

As to appellant's activities of November 13th, 1987, the jury heard evidence that the habitual operator of the white BMW leased by his sister when she was out of town working (Tr. 89.) The jury further heard from appellant himself that the nine millimeter Browning pistol and the pager were his property. (Tr. 772, 782.) Mitchell Burney testified that Calvin's pager went off during the drive in the BMW prior to their arrest on the 13th. (Tr. 709, 736-737.) Special Agent Carter testified that at about the same time on the 13th, he was in the presence of Atkinson who called a paging company to have his suppliers paged, and that (middle man) Atkinson specifically told him what he

was doing while he did it. (Tr. 126.) Detective Zaller testified that at the scene of the arrest on the 13th, the pager taken from Calvin Burney had Atkinson's phone number stored as the most recent caller. (Tr. 287-288.) Zaller also testified that appellant tried to flee the police blockage on the 13th. (Tr. 275.)

Appellant testified that he had the gun because he was going to purchase macaroni salad for his fish store and denied the pager contained Atkinson's phone number. (Tr. 754 and 782.)

Accordingly, the trier of fact in this case, the jury, had before it sufficient evidence to support a conviction for drug trafficking and possession beyond a reasonable doubt.

An appellate court will not reverse a judgment of conviction where the record shows that a conviction was based upon sufficient evidence. State v. DeHass (1967), 10 Ohio St. 2d 230.

Accordingly, assignment of error II is without merit.

V. ASSIGNMENT OF ERROR NO. III

"THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE CONTAINED WITHIN R.C. 2923.12 (C)(1)."

Appellant, in his third assignment of error, argues that the trial court erred in failing to instruct the jury on the affirmative defense contained within R.C. 2923.12 (C)(1). Specifically, appellant argues that he was carrying a concealed weapon for a lawful business purpose.

This assignment of error is not

well taken.

ISSUE: WHETHER APPELLANT WAS ARMED FOR A LAWFUL BUSINESS PURPOSE AT THE TIME AND PLACE OF ARREST

The justification for carrying a concealed weapon must be measured by the facts and circumstances as they existed at time of the arrest ***." State v. Johnson (Montgomery Cty. 1972), 31 O. Misc. 145, 60 O.O. 2d 301, 283 N.E. 2d 452.

Appellant's assertion of the affirmative defense contained in R.C. 2923.12(C)(1) is that he possessed the nine millimeter Browning pistol for the opening and closing of his lawful fish store business. Assuming this to be a true assertion, appellant cannot use this reason to justify his gun possession in the middle of the afternoon miles away from his store.

Therefore, the trial court correctly held that the reason the affirmative defense would not be given to the jury was that the evidence did not "*** raise the facts necessary for a minimum showing of the defense." (Tr. 833-834.)

Accordingly, assignment of error III is without merit. The trial court is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANCIS E. SWEENEY, J., and

PATTON, J., CONCUR.

DAVID J. MATIA
PRESIDING JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellant Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

THE SUPREME COURT OF OHIO

1991 TERM

To wit: December 18, 1991

State of Ohio,	:	
Appellee,	:	Case No. 91-2020
v.	:	E N T R Y
Mitchell Burney,	:	
Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James R. Willis.

(Court of Appeals No. 58815)

THOMAS J. MOYER
Chief Justice

APPENDIX "C"

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 58611

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
-vs-	:	AND OPINION
	:	
MITCHELL BURNEY	:	
	:	
Defendant-appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 1, 1991
CHARACTER OF PROCEEDING	:	Criminal Appeal from Common Pleas Court No. CR-238069
JUDGMENT	:	AFFIRMED.
	:	

DATE OF JOURNALIZATION: _____

APPEARANCES :

For Plaintiff-Appellee:

STEPHANIE TUBBS-JONES
Cuyahoga Cty. Pros.
BLAISE THOMAS, ESQ.
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant

MICHAEL MURMAN
14701 Detroit
Lakewood, Ohio
44107

APPENDIX "D"

HARPER, J:

Defendant-appellant, Mitchell Burney, was initially indicted by the Cuyahoga County Grand Jury (CR222830) on December 28, 1987. A second indictment was returned by the Grand Jury on April 17, 1989, wherein the initial drug abuse charges were raised to drug trafficking. Appellant now appeals the verdict which found him guilty of violating R.C. 2925.03 (three counts), R.C. 2925.11, R.C. 2925.13 (two counts), R.C. 2923.12, and R.C. 2923.24, as alleged in the second indictment.

I.

A.

Both indictments stemmed from drug activity which occurred on November 6, 1987, and November 13,

1987.

A joint task force was formed between agents of the Bureau of Alcohol, Tobacco, and Firearms and officers from the Cleveland Police Department in October, 1987. The purpose of the task force as to investigate narcotics and firearms violations.

A surveillance team was organized in preparation for a controlled buy scheduled to take place in November, 1987. This buy was prearranged with a middle man, codefendant William Atkinson. Special Agent Ron Carter, who was wired, purchased one ounce of cocaine from the occupants of a white BMW on November 6th. Carter identified codefendant Calvin Burney as the driver and appellant as the

passenger. No arrests were made as a result of this sale. The surveillance team monitored the transaction from mobile units.

A second prearranged controlled buy was scheduled for November 13, 1987 at Atkinson's house. The team planned on arresting the occupants of the white BMW before they arrived at the house to secure Carter's safety as an undercover agent.

Carter arrived at Atkinson's house as scheduled. Carter was informed by Atkinson that only three ounces of cocaine were available as his sources were unable to go to the "stash house". However, Atkinson told Carter that he could still purchase the cocaine for a discount price of $1,200 per ounce and that additional

cocaine would be available later that afternoon.

Carter was at the house for approximately one and one-half hours. Atkinson made several telephone calls during this time, and paged his sources to expedite the delivery.

Carter's office then paged him and told him to leave the residence. As instructed, Carter left the house. He was met by the police and arrested, as were his informant and Atkinson.

In the meantime, other members of the task force stopped the BMW at 116th Street and Melba when it was approximately three blocks from Atkinson's house. The vehicle was successfully stopped by surrounding it on three sides by unmarked police cars. Calvin Burney, the, driver at

one point attempted to back out of the blockade but stopped when order to do so. The occupants were seen to be moving in the vehicle in what was termed a "commotion" by an observing detective.

A loaded nine millimeter Browning automatic pistol was retrieved from the from bucket seats. The members of the task force also confiscated three ounces of cocaine from appellant's pocket and a pager from codefendant Calvin. The pager listed Atkinson's telephone number as the most recent caller in its liquid crystal display.

B.

The original indictment was brought against appellant on December 28, 1987 as a result of the November 6 and 13, 1987 events. Appellant's

arraignment of this indictment occurred on January 26, 1988. Appellant waived his right to a speedy trial on July 6, 1988. On August 10, 1988, a motion to suppress evidence was filed, said motion being heard and overruled by the trial court on April 4, 1989. Both parties thereafter requested that the trial scheduled for March 29, 1989 be continued; whereupon a pretrial was scheduled for April 19, 1989.

The Cuyahoga County Grand Jury returned the second indictment on April 17, 1989 in which the initial drug abuse charges were raised to drug trafficking. On May 4, appellant entered a "plea in bar", seeking a dismissal of the indictment based on denial of a speedy trial. Appellant

pled not guilty at his arraignment on May 8, 1989. The trial court subsequently nolled two counts of the indictment.

Trial by jury commenced on August 14, 1989 on the remaining eight counts. The jury returned a verdict of guilty as to these eight counts on August 25, 1989.

On September 14, 1989, the trial court sentenced appellant to a term of three (3) years to fifteen (15) years, three (3) years actual on count one; six (6) months county jail time on count two; five (5) years to twenty-five (25) years, five (5) years actual with three (3) years prior to and consecutive on gun specification on counts three and five; six (6) months on count four; one year each on the

remaining three counts. All terms were to run concurrent.

The initial indictment of December 28, 1987 was dismissed as a result of a nolle prosequi on October 2, 1989.

Appellant appeals from the within verdict and sentence. For the reasons that follow, we affirm.

II.

Appellant's first assignment of error is that:

> **"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE CHARGES THEREBY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONAL AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND HIS STATUTORY RIGHT TO SPEEDY TRIAL UNDER R.C. 2945.71 AND 2945.73."**

There is no dispute that

appellant waived his right to a speedy trial of the initial indictment. However, he argues that this waiver did not constitute a knowing and intelligent waiver of such right as to the second indictment. Appellant, therefore, asserts that the trial court erred in not dismissing the second indictment based on appellant's denial of his right to a speedy trial.

The Sixth Amendment to the United States Constitution guarantees a defendant a right to a speedy trial. Section 10, Article I of the Ohio Constitution provides a similar provision.

A defendant's right to a speedy trial is codified in R.C. 2945.71. This statute was enacted as

> "'*** a rational effort to enforce the constitutional

> right to a public speedy trial of an accused charged with the commission of a felony or a misdemeanor and shall be strictly enforced by the courts of this state.'"

State v. Packay (1980), 64 Ohio St. 2d 218, syllabus.

A.

A defendant can waive this right to a speedy trial if done so knowingly, voluntarily and intelligently. In order for a waiver to be entered voluntarily, the defendant must understand the nature of the charges against him. State v. Adams, (1989), 43 Ohio St. 3d 67, 69. The defendant must also know what is being waived as well as the extent of the waiver. Id.

The Ohio Supreme Court in State v. Adams, supra, addressed the issue

of whether a defendant's waiver of his right to a speedy trial as to an initial charge acts as a waiver of that same right to a subsequent charge. The court held that

> "'*** when an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver."

Id., 70. The court's reasoning behind its holding was that a knowing and intelligent waiver as to a right to speedy trial as to the subsequent indictment when the latter could involve different defenses at trial. Id., 69-70.

This reasoning applies to the within action. Thus, the original waiver as to the initial indictment

for drug abuse does not apply to the later indictment which included drug trafficking charges. See State v. Burney (1991), Cuyahoga App. No. 58611, unreported.

B.

This court, having determined that the appellant did not waive his right to a speedy trial, must now determine if he was denied said right. Appellant was charged with various felonies. Appellee was thereby statutorily required to bring appellant to trial within 270 days after his arrest:

> "(C) A person against whom a charge of felony is pending:
>
> "***
>
> "(2) Shall be brought to trial within two hundred seventy days after his arrest."

R.C. 2945.71(C)(2).

Appellant was arrested on November 13, 1987. Appellant's trial on charges set forth in the second indictment commenced on August 14, 1989. The 270 day statutory time limit was clearly exceeded as approximately 630 days elapsed between the date of arrest and the commencement of trial.

The R.C. 2945.71 time limits may be extended pursuant to R.C. 2945.72. This statute provides:

> "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only be the following:
>
> "****
>
> "(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion,

> proceeding, or action made or instituted by the accused;
>
> "****
>
> "(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion;
>
> "***"

In the case sub judice, a pretrial scheduled for February 9, 1988 was rescheduled for February 17, 1988, pretrial was once again rescheduled for March 18, 1988. The record does not indicate the cause of these continuances. These entries will not, therefore, toll the time since we cannot infer that defendant requested the continuances.

A motion to suppress evidence was filed by appellant on August 10, 1988.

The trial court denied this motion on April 4, 1989. Accordingly, 234 days were tolled when both parties requested a continuance of the trial scheduled for March 29, 1989. Appellant then made a plea in bar, moving to dismiss for lack of speedy trial; 114 days were tolled as a result since the trial court denied the motion on August 28, 1989. The total number of days tolled at appellant's request for these motions and continuances were 369.

EVENT	DATE	ELAPSED TIME
Arrest	November 13, 1987	
Motion to Suppress	August 10, 1988	
Denial of Motion to		

Suppress	April 4, 1989	234 days
Request for Continuance	March 29, 1989	21 days
Continuance granted to April 19, 1989		
Plea in bar (motion to dismiss)	May 4, 1989	
Denial of motion to dismiss	August 28, 1989	114 days
TOTAL ELAPSED TIME		**369 days**

The statutory time period set forth in R.C. 2945.71 is thereby extended 369 days. R.C. 2945.72; see, State v. Bickerstaff (1984), 10 Ohio St. 3d 62, 67. The subtraction of 369 days from the total of 261 days since appellant's arrest, 630, results in the total of 261 days. The appellant was, therefore, brought to trial within 270 day statutory time period.

Accordingly, appellant's first assignment of error is overruled.

IV.

Appellant, in his second assignment of error, asserts that:

"THERE IS CONSTITUTIONALLY INSUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR TRAFFICKING IN DRUGS, R.C. 2924.03(A)(7) [sic]."

R.C. 2925.03(A)(7) provides in relevant part:

"(A) No person shall knowingly do any of the following:

"***

"(7) No person shall knowingly sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount."

Appellant does not deny that three ounces of cocaine were found in his pocket at the time of his arrest. However, appellant asserts that there is not a "*** scintilla of evidence to support the essential element of a

sale or offer to sell cocaine***." He argues that his conviction for count three along with the firearm specification must be vacated as the state failed to prove this essential element.

The following is the test for sufficiency of the evidence:

> "'*** [T]he test is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence." [Citations omitted.]'

State v. Davis (1988), 49 Ohio App. 3d

109, 111, quoting State v. Martin (1983), 20 Ohio App. 3d 172, 175.

In the within action, the record discloses that a rational trier of fact could find beyond a reasonable doubt the appellant knowingly sold or offered to sell cocaine from the evidence and inferences reasonably drawn therefrom. Thus, appellant's conviction was sustained by sufficient evidence.

The evidence establishes that appellant planned and communicated with Atkinson, the middleman, to sell him three ounces of cocaine on November 13, 1987. The testimony of Agent Carter corroborated this sale plan. Atkinson called his supplier when Agent Carter was present in Atkinson's house. Atkinson informed

Carter that his supplier only had three ounces of cocaine to sell rather than the originally planned four ounces. Furthermore, Atkinson testified that the appellant telephoned him on November 13, 1987 to confirm his arrival at Atkinson's house.

The evidence clearly reveals that the appellant offered to supply three ounces of cocaine to Atkinson for his customer, Agent Carter. Appellant's second assignment of error, is therefore overruled.

V.

Appellant's third assignment of error is that:

"THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTION OF CARRYING A CONCEALED WEAPON OF CARRYING A CONCEALED WEAPON [SIC] AND THE FIREARM SPECIFICATIONS PURSUANT TO

R.C. 2923.12 provides that:

"(A) No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordnance."

R.C. 2929.71(A) requires that the offender be "convicted of" the specification. As such, the state must prove beyond a reasonable doubt the elements of the specification. This proof is required even though the gun specification involves enhanced punishment and not a distinct crime. See State v. Broadus (1984), 14 Ohio App. 3d 443. The state must, therefore, first establish that the offender is convicted of, or pleads guilty to, a felony other than a violation of R.C. 2923.12. Second, it must be shown that the offender, while committing the felony, had on or about his person or under his control a

device which conforms to the definitions found in R.C. 2923.11(A) and (B). It follows that this device must be both a "deadly weapon" and a "firearm". See State v. Boyce (1985), 21 Ohio App. 3d 153, 154. Thus, the state must prove beyond a reasonable doubt that the firearm was operable or could have been rendered operable at the time of the offense prior to imposing an additional three years actual incarceration under R.C. 2929.71(A). State v. Rice (1990), 50 Ohio St. 3d 51.

Finally, R.C. 2923.03 reads in part as follows:

"(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

"***

"(2) Aid or abet another in committing the offense;

"(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

"***

"(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

Appellant avers that the state failed to prove he had knowledge of the weapon's presence beyond a reasonable doubt. Codefendant Calvin Burney was the owner of the weapon. Appellant asserts that Calvin carried the weapon in the glove compartment for business purposes only and "[t]here is no evidence contradicting this position." He, therefore, argues that he was wrongly convicted of carrying a concealed weapon and of the firearm specification as either a

principal offender or an aider and abettor.

Appellant's insistence that the weapon was only in the glove compartment for business reasons was indeed contradicted by Detective Zaller's testimony. Zaller testified that the gun was found in between the front bucket seats. A photograph of the gun as found was introduced into evidence. Furthermore, appellant's reliance on Calvin Burney's acknowledged ownership of the gun does not absolutely preclude finding appellant guilty of the offense of carrying a concealed weapon. "Access to a weapon not ownership is determinative of guilt". State v. Lowry (Aug. 9, 1990), Cuyahoga App. No. 59182, unreported, citing State v.

Lane, et. al. (Dec. 3, 1981), Cuyahoga App. No. 43523, unreported.

Although appellant maintains his innocence as to the weapon's charges, the circumstances present were those that a jury could reasonable conclude appellant was aware of the weapon's presence. There was testimony that appellant and Calvin were commonly driving the white BMW. They were involved in the sale of drugs and the white BMW was used to perfect the sales. Appellant knew that Calvin Burney owned the gun and carried it in the car. The gun was found in between the front bucket seats with the butt of its protruding above the seats. The appellant was seated in the front passenger seat. Appellant explained that he did not see the weapon in the

car because it was in the glove compartment. Appellant, however, recognized the gun in the photograph entered into evidence which depicted the position of the gun when found by the police. The jury could, therefore, reasonably infer that appellant was aware of the gun's presence in the car.

Detective Zaller was present during the test firing of the gun retrieved from the vehicle. He testified to the gun's operability.

The credibility of the witnesses and the weight to be afforded their testimony are matters within the province of the jury. A judgment of conviction will not be reversed by a reviewing court with the substitution of its own judgment when the record

reveals that a jury's verdict is supported by sufficient evidence. State v. DeHass (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus.

In the case sub judice, there was sufficient evidence in support of the jury's verdict on the carrying a concealed weapon charge and of the firearm specification. The appellant knowingly had a concealed deadly weapon ready at hand (R.C. 2923.12)[1]/

1/ Although the issue of whether the gun was concealed is not present here, a "partially concealed weapon is 'concealed' within the meaning of R.C. 2923.12." State v. Almalik (1987), 41 Ohio App. 3d 101, paragraph three of the syllabus; also, State v. Jorgenson (Oct. 25, 1990), Cuyahoga App. No. 57694, unreported.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DAVID T. MATIA, P.J., CONCURS;

SPELLACY, J., CONCUR (SEE

ATTACHED CONCURRING OPINION).

SARA J. HARPER
JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellant Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF
OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 58815

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	CONCURRING
v.	:	OPINION
	:	
MITCHELL BURNEY	:	
	:	
Defendant-Appellant	:	

DATE: August 1, 1991

LEO M. SPELLACY J.:

I concur with majority in affirming the conviction of defendant-appellant Mitchell Burney for four counts of drug trafficking, two counts of drug abuse felony, one count of carrying a concealed weapon, one count of possession of criminal tools, and a gun specification. I write separately, however, to address appellant's first assignment of error, the majority found that appellant's

speedy trial waiver as to his initial indictment does not apply to the later indictment pursuant to State v. Adams (1989), 43 Ohio St. 3d 67. I disagree.

In Adams, supra, the Ohio Supreme Court addressed the following issue:

> When an accused waives the right to a speedy trial as to an initial charge, can this waiver apply to a subsequently filed charge which arises out of the same facts as the former charge, when the later charge is brought after a nolle prosequi is entered as to the first charge?

Id., at 68.

Adams, supra, is limited to waivers of a defendant's right to a speedy trial when the defendant's first indictment is dismissed and then defendant is subsequently indicted for a different charge. State v. Lucey

(May 16, 1991), Cuyahoga App. NO. 58545, unreported. Adams, supra, clearly dealt with a case when the second indictment was brought after a nolle prosequi was entered as to the first indictment. Adams, supra, at 68.

In the instant case, appellant's second indictment did include different charges. However, when the second indictment was rendered, appellant's first case had not been dismissed until after appellant was tried and sentenced.

Since appellant's second indictment did not follow a nolle prosequi of his initial indictment and the second indictment arise from the same set of facts and circumstances as the first, I find that his speedy

trial waiver does apply herein. I conclude that Adams, supra, is inapplicable to this case.

Therefore, I conclude that appellant was not denied his right to speedy trial since his original waiver as to the initial indictment applies to the later indictment.

ARGUMENTS AND RULING MADE AT TRIAL COURT IN CONNECTION WITH MOTION TO DISMISS

MR. SHAUGHNESSY (ATTORNEY FOR CALVIN AND MITCHELL BURNEY):

Your Honor, that case, and I'm talking now about 222830, went -- proceeded -- as a matter of fact, started in the United States District Court for the Northern District of Ohio, which referred directly to our County Grand Jury, the Federal people having apparently declined. They usually decline if they don't have pictures, fingerprints, signed confessions and that sort of thing. In any event, they kicked it over to the good people in Cuyahoga County.

We were arraigned on January 14, 1988, and that was a multi-count indictment that reflects to some degree the same charges in the case we are about to try, if you agree with the State, Case No. 238069.

In any event, on June 28, 1988, we signed waivers of speedy trial relative to Case No. 222830, and those were indefinite, and each defendant in open court consented to this case, Case No. 222830, being continued, even if it had to be continued indefinitely, and that certainly was our posture and still is our posture with Case No. 222830.

* * *

MR. SHAUGHNESSY:

Well, it was sometime in the early part of this year you entertained motions to suppress. At that time the State of Ohio, Mark Fellenbaum representing the State, sought to amend the indictment in 222830 from a charge of drug abuse to a charge of drug trafficking, changing the code number, the number of the Ohio Revised Code, as well as bulk of the possession.

You indicated he couldn't.

The State then said, "Well, we will go back to the Grand Jury," which is the only proper way to do it, and the State did then go back to the Grand Jury, and sometime prior to the arraignment on May 4th, 1989, sought and got an indictment in the new case, and the new case being 238069

Now, when we appeared at the arraignment on May the 4th, 1989, we said a number of things, and in the motion to suppress one of the things we presented to the Judge in the arraignment room, and I thought it was necessary that we do that, instead of -- you see, we didn't enter pleas of not guilty, but we entered a plea at bar and allowed the Judge -- Judge Matia entered the plea for us, which I think is proper, and we said that the -- that as of that day, May the 4th,

that we were -- well, I forget the time --

THE COURT:

Five hundred thirty days.

MR. SHAUGHNESSY:

-- 530 days had elapsed from the date of the initial arrest, that on that day more than 530 days went by since the date of the arrest, November 12, 1987. I don't think we have to quibble about arithmetic. It's clearly beyond the time.

We further indicated and agreed that as from May 4th to whatever day you got the case back and whatever day you would have available for trial that we would waive that period. I[n] other words, we were not contesting any time after May 4th to whatever day you set it. We were contesting the time solely from November 13, 1987 to May 4, 1989.

THE COURT:

So you are either in time or out of time on the arraignment date, May 4, 1989?

MR. SHAUGHNESSY:

Absolutely, your Honor, and that's what we are asking you to dc today. Certainly the spirit of the Constitution of the United States and

the Ohio Constitution and certainly the intent of the legislature and, of course, if one -- if we confer a right on someone, one may waive that right if one wants to.

As far as the lower numbered case, your Honor, for whatever reason, we had no problem, and we had a right to be tried in 270 days on that case. We chose then, a year ago, to say "Well, we will waive that right and let the case be tried at the convenience of the Court and counsel for the State."

THE COURT:

All right. Mr. Thomas.

* * *

MR. THOMAS [COUNSEL FOR THE STATE]:

On behalf of the State of Ohio, as your Honor is aware, this case has gone through a number of prosecutors, but my understanding of the posture of the case is that the arrest dates for both files, 222830 and 238069, are, in fact, the same.

Now, Mr. Shaughnessy's argument is a cat and mouse argument. He's asking the Court that although represented by very able counsel -- well, the Court is aware that the facts underlying these charges are a series of transactions and negotiations that took place with the Cleveland police and various other agents of the

federal government and that the nature of the charges are not a surprise. The trafficking was present on the first indictment and is present on the second indictment. The amount of cocaine is present on the first indictment, and it's present on the second indictment, three times bulk.

The nature of the charges only changed as to the gun specification on the second indictment, but the gun was present and a factor in the prior indictment.

Therefore, under State -v- Clay, 9 Ohio App. 3d 216, the squib would read, "Arrest on one charge. Later indicted on several charges all arising from same transaction. Facts known to State at time of arrest. Time for trial for all charges from date of arrest on first charge."

If that works against the State, your Honor, it's also got to work against the defense. They were aware of the nature of the charges. Nothing has really changed. Therefore, that waiver applies to the reasonableness of the timing of the trial on this second indictment.

Furthermore, there has been no demonstration by the defense that there's been any impairment in the delay, and under U.S. -v- Wehling, 676 F.2d 1053, your Honor, the defendant must demonstrate impairment in the ability to defend under pre-indictment

delay.

* * *

In essence, Your Honor, what the State is saying is that there has been no impairment to the defense in the case, the charges have remained the same, and there was a valid waiver by the individual defendants and that they are bound by that waiver.

* * *

THE COURT:

All right. I have had both these cases since their inception. I understand the arguments on both sides. I believe I understand the law. I'm going to overrule the motion.

MR. SHAUGHNESSY:

All right. Thank you, sir.

Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

No. 91-1323

IN THE

Supreme Court of the United States

October Term, 1991

CALVIN BURNEY AND MITCHELL BURNEY,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE J. SADD
Counsel of Record
Assistant Prosecuting Attorney
STEPHANIE TUBBS JONES
Cuyahoga County Prosecutor
LAURENCE R. SNYDER
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7730
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

COUNTER QUESTIONS OF LAW

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILING TO ESTABLISH THAT A FEDERAL QUESTION WAS DECIDED BY THE STATE COURT OF APPEALS AND WHERE IT FAILS TO DEMONSTRATE THAT THERE EXISTS SPECIAL AND IMPORTANT REASONS FOR THE GRANTING THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

STATEMENT OF THE CASE

Calvin Burney and Mitchell Burney, the petitioners herein, were indicted by the Grand Jury of Cuyahoga County, Ohio, on December 28, 1987. The case was given the number CR 222830. The events which resulted in the indictment occurred on November 6 and 13, 1987. Both petitioners signed a speedy trial waiver in CR 222830.

On April 17, 1989, the same Grand Jury returned a second indictment which named both of the petitioners. The case was given the number CR 238069. The second indictment was also based on events which occurred on November 6 and 13, 1987.

A jury trial was commenced on August 14, 1989 in CR 238069. On August 25, 1989, both petitioners were found guilty on eight (8) counts of the indictment. On October 2, 1989, the indictment in CR 222830 was dismissed as the result of a *nolle prosequi.*

Both petitioners appealed their convictions to the Court of Appeals of Ohio, Eighth District. On June 6, 1991, the appeals court announced its Journal Entry and Opinion wherein it affirmed the convictions of Calvin Burney. On August 1, 1991, the appeals court announced its Journal Entry and Opinion wherein it affirmed the convictions of Mitchell Burney. Petitioner Calvin Burney's motion for leave to appeal to the Supreme Court of Ohio was overruled on November 13, 1991. Petitioner Mitchell Burney's motion for leave to appeal to the Supreme Court of Ohio was overruled on December 18, 1991.

STATEMENT OF THE FACTS

In October of 1987, Special Agent Ron Carter of the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms (ATF), was assigned to participate in a joint task force operation in the greater Cleveland area between ATF agents and the Cleveland Police Department Narcotics Unit.

The purpose of the operation was to develop and pursue information of narcotics and firearms offenses. Agent Carter learned of a person named "Billy" dealing cocaine and marijuana in Cleveland. The task force personnel decided to pursue a deal with "Billy" and Agent Carter was to arrange the purchase of one ounce of cocaine from "Billy" with Cleveland police buy money.

The plan was to allow the purchase of the one ounce of cocaine to go through without an arrest in order to facilitate the investigation. The purchase was set for the 6th of November, 1987, with surveillance teams monitoring the body wire worn by Carter.

At 2:30 p.m. on November 6, 1987, Carter drove to 3340 East 113th Street in Cleveland, Ohio, and met with "Billy," who was William Atkinson. Atkinson gave Carter instructions to drive to a location without giving him the destination. They arrived at the intersection of Delmont and Euclid and waited in the parking lot of a Kentucky Fried Chicken franchise. Carter had $1,500 in Cleveland police buy money with him for the one ounce purchase. After a ten minute wait, a white BMW with two occupants drove past and stopped in front of Carter's vehicle. Atkinson indicated that Carter was to follow and park near the BMW on the street.

Carter identified Calvin Burney as the driver of the white BMW and Mitchell Burney as the front seat passenger. Atkinson left Carter's vehicle with the $1,500 and went to the BMW and returned with the ounce of cocaine. Carter was able to read the license plate on the BMW as 418 HFT, and recited it aloud for the body wire monitor while Atkinson was out of the vehicle. Carter testified he clearly saw Calvin Burney as the driver twice, once during the drive-by and once during the transaction on the street. When Atkinson returned with the cocaine, Carter examined it and Atkinson then waved off the Burneys and they left.

On November 9, 1987, Carter went to the Cleveland Police Department and identified Calvin and Mitchell Burney from photographs as the occupants of the BMW. At this time, it was decided to place another order with Atkinson for four ounces of cocaine and to arrest the petitioners and Atkinson during the transactions. The plan was to conduct surveillance of the petitioners and to stop them either prior to their arrival at Atkinson's residence or the street location if the deal did not happen at Atkinson's residence.

On November 13, 1987, at 11:00 a.m., wearing the body wire, Carter again went to Atkinson's residence at 3340 East 113th Street. Carter had prearranged the price with Atkinson at $1,200 per ounce for a total purchase of $4,800 for four ounces. Upon Carter's arrival, Atkinson pulled Carter aside and told him, "... he had good news and bad news for me. He stated the bad news that there was only going to be three ounces of cocaine, instead of four, because his sources didn't have time to go to the stash house. He stated that the good news was that it would still be $1,200 an ounce, that we wouldn't have to go anywhere, that the transaction would take place there."

They went to the dining room and Atkinson counted the buy money Carter had brought with him. During this time conversation ensued in which Carter asked Atkinson if Carter could purchase more than four ounces at a time at a later date. Atkinson said that he could.

Atkinson began to get impatient and began making phone calls to attempt to hurry up the delivery. Atkinson stated to Carter and Carter observed that Atkinson was calling a paging company to page his suppliers.

Carter waited for one and one-half hours and was paged by his office and told to leave Atkinson's residence. As he was leaving, the police units converged on the residence and arrested Atkinson, Carter and Carter's informant.

Just prior to these events, the white BMW, bearing Ohio license plate 418 HFT, containing the petitioners, was being observed by the other members of the task force, including Detective Daniel Zaller of the Cleveland Police Department Narcotics Unit.

At approximately 1:30 p.m. on the 13th, the BMW was stopped by the task force at 116th Street and Melba, three blocks from Atkinson's residence on 113th Street. Two police vehicles converged on the BMW from the front, one from the rear, and another was alongside the BMW. The officers identified themselves. At trial, Calvin Burney agreed that some of the officers were wearing badges which were visible and all of the officers had weapons drawn. Mitchell Burney testified that he saw a police car in front of the BMW and guns everywhere.

As the police teams blocked the progress of the BMW, Calvin Burney, who was driving, attempted to back the BMW out of the blockade and had to be

ordered to stop. The petitioners were seen to be moving around inside the BMW in what Detective Zaller termed a "commotion." Zaller exited his vehicle and approached while the petitioners were being removed from the BMW by other officers.

At his arrival at the BMW, Zaller observed a gun between the front seats. Zaller then handcuffed and searched Mitchell Burney, finding three ounces of cocaine in his jacket. Zaller checked the gun, a nine millimeter Browning automatic pistol, and found it to be loaded with a round in the chamber. Zaller had the pistol tested prior to trial by the Cleveland Police Department Scientific Investigation Unit and it was fired in his presence.

Detective Zaller found a Mobilcom pager on Calvin Burney at the scene. The pager had a liquid crystal display and a memory function to display numbers of persons calling the pager. At the time the pager was removed from the person of Calvin Burney, it had William Atkinson's phone number stored as the most recent caller.

A trial on charges resulting from the arrests commenced on August 14, 1989. The petitioners were originally indicted on December 28, 1987 (Case No. CR 222380). They were reindicted on April 17, 1989 (Case No. CR 238069). The trial judge ruled that all prior rulings in CR 222380 would apply in CR 238069. Petitioners each signed a speedy trial waiver on July 6, 1988.

Petitioners filed a Motion to Suppress Evidence on August 10, 1988. Petitioners requested a trial continuance on March 29, 1989. On May 4, 1989, petitioners filed a Motion to Dismiss CR 238069 for lack of a speedy trial, pursuant to O.R.C. 2945.71.

SUMMARY OF ARGUMENT

There is no substantial federal question which would require this Honorable Court to review this case.

The questions presented herein were raised in the Eighth District Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio. The jury in the trial court found the petitioners guilty. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed *sua sponte* the petitioners' appeal for the reason that no substantial constitutional question existed.

The Ohio Courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court, the Supreme Court of the United States. There is, therefore, no substantial federal question presented by the petition for certiorari.

REASONS FOR DENYING THE WRIT

1. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILING TO ESTABLISH THAT A FEDERAL QUESTION WAS DECIDED BY THE STATE COURT OF APPEALS AND WHERE IT FAILS TO DEMONSTRATE THAT THERE EXISTS SPECIAL AND IMPORTANT REASONS FOR THE GRANTING THEREOF.

The petitioners have presented a total of four questions for review in their Petition for a Writ of Certiorari.

In the first and second questions for review, the petitioners allege a denial of "due process," but fail to follow through with any discernible argument which would support such a claim. The petitioners' first two arguments, in summary, are as follows: (1) petitioners filed a Motion to Dismiss Case No. CR 238069 on the basis of the State of Ohio's speedy trial statutes (O.R.C. 2945.71-.73); (2) the trial court denied the motion; (3) Findings of Fact and Conclusions of Law were not issued; (4) the petitioners filed separate appeals alleging that the denial of the speedy trial motion was erroneous because the speedy trial waiver they signed in Case No. CR 222830 did not, or should not, apply to Case No. CR 238069; (5) the appellate court, in two separate opinions, agreed that the speedy trial waiver in CR 222830 could not be applied to CR 238069; (6) the appellate court, however, held that regardless of whether the speedy trial waiver was applicable, the petitioners had been brought to trial within the time limits of the Ohio Revised Code; and (7) it was a denial of due process for the appellate court to base its opinion on the Ohio Revised Code where neither the petitioners nor the prosecution raised the issue of compliance with the statute on appeal.

Petitioners make no allegation that they were denied a speedy trial as mandated by the United States Constitution or the Constitution of the State of Ohio. Instead, they challenge the lawfulness of the appellate court's application of O.R.C. Sections 2945.71, 2945.72 and 2945.73. They do not challenge the aforementioned code sections' constitutionality, only the propriety of the application thereof by the appellate court.

O.R.C. 2945.71 mandates that any person against whom a charge of felony is pending "shall be brought to trial within two hundred seventy days after his arrest." In the pending case, the petitioners, along with a third co-defendant, filed a joint motion to dismiss CR 238069 which was based solely on a denial of speedy trial pursuant to O.R.C. 2945.71-O.R.C. 2945.73. Prior to trial the judge heard arguments on behalf of both the State and the petitioners with regard to the speedy trial issue. The judge denied the motion and did not issue any Findings of Fact or Conclusions of Law. Counsel for petitioners made no request for Findings or Conclusions.

Despite the fact that the trial judge never made a specific ruling as to whether the speedy trial waiver in the first case applied in the second case, the petitioners appealed alleging that if he had ruled that way his judgment would have been erroneous.

The appellate court, while accepting the argument of the petitioners as a truism, held the application of the speedy trial waiver to be irrelevant to resolution of the ultimate issue of compliance with the speedy trial statute. Instead, the appellate court held that the petitioners had, in fact, been brought to trial within the time limits as set out in the Ohio Revised Code. Code Section 2945.72 provides for an extension of the statutory speedy trial time for "[a]ny period of delay

necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused" and "[a]ny period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." With regard to speedy trial statutes, this Court has held: "The States, of course, are free to prescribe a reasonable period consistent with constitutional standards . . ." *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). The Supreme Court of Ohio has found Ohio's statutory speedy trial guidelines to "represent a rational effort to enforce the constitutional guarantee of a speedy trial." *State v. Pachay*, 64 Ohio St. 2d 218, 416 N.E. 2d 589 (1980). In the pending case, the appellate court found that various continuances and delays which resulted from the actions of the accused extended the statutory speedy trial limits pursuant to O.R.C. 2945.72. Each and every action of the petitioners, which caused the extensions of time, was a matter of record.

In summary, the petitioners filed a trial motion to dismiss their case on the basis of O.R.C. 2945.71-2945.73. The trial court denied the motion. The petitioners appealed the denial of the motion. The Court of Appeals affirmed the judgment of the trial court and held that the petitioners had, in fact, been brought to trial within the time limits of O.R.C. 2945.71-2945.73. The holding of the appellate court involved no federal question. The petitioners' first and second arguments in support of their Petition for a Writ of Certiorari raise no federal question. There is no special and important reason for granting the writ based on the arguments of the petitioners.

In their third argument, as in the first two, the petitioners again fail to present the Court with a question of federal law. In summary, the petitioners are arguing that a trial court has a duty to give an affirmative defense jury instruction if a defendant presents *any* evidence in support thereof. O.R.C. 2923.12(C)(1) reads as follows:

> "(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordinance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply:
>
> (1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in or was going to or from his lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent man in going armed."

It is well settled that it is unnecessary for a trial court to give requested jury instructions where the proponent has failed to present sufficient evidence in support thereof. *State v. Bailey*, 100 S. Ct. 624, 444 U.S. 393 (1980). The trial court, in the pending action, denied the request for the instruction and held that the evidence did not "*** raise the facts necessary for a minimum showing of the defense." There was *no* evidence presented as to several elements of the defense and the instruction, therefore, was not mandated.

Petitioners' third argument raises no federal question and there exists no special and important reason for granting a writ of certiorari.

In their fourth and final argument, the petitioners assert that there was insufficient evidence to convict both of them of carrying a concealed weapon. Viewing the evidence presented at trial in a light most favorable to the government, a rational trier of fact could have found both petitioners guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S 307, 99 S. Ct. 2781 (1979). The appellate court noted with particularity the evidence which supported each and every element of the offense charged. Petitioners make no effort to establish that a federal question was decided by the State appellate court nor do they present special and important reasons for granting a writ of certiorari.

CONCLUSION

There has been no important question of federal law decided by the State appellate court and no important and special reason exists for the granting of a writ of certiorari. The petition, therefore, should be denied.

Respectfully submitted,

GEORGE J. SADD
Counsel of Record
Assistant Prosecuting Attorney
STEPHANIE TUBBS JONES
Cuyahoga County Prosecutor
LAURENCE R. SNYDER
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7730
Attorneys for Respondent

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OCTOBER TERM, 1991

CALVIN BURNEY

and

MITCHELL BURNEY,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The Eighth District Court of Appeals For Cuyahoga County, Ohio

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JAMES R. WILLIS, ESQ.
Attorney for Petitioners
Suite 350, Courthouse
Square Building
310 Lakeside Ave., N.W.
Cleveland, Ohio 44113
(216) 523-1100

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The argument of counsel opposite

that "Petitioners make no allegation that they were denied a speedy trial as mandated by the U.S. Constitution..." (**Brief In Opposition**, **p. 9**) makes no sense at all. For it could not be clearer that R.C. of Ohio, §§2945.71-73, were expressly designed to insure compliance with the U.S. Constitutional requirement of a speedy trial (Sixth Amendment, United States Constitution). Indeed, the Ohio Supreme Court expressly concluded that such was the purpose of this legislation. The fact that this is so was even recognized by counsel opposite in his **Brief In Opposition**. The reference here is to counsel crediting the Ohio Supreme Court with having determined that the statutes referred to above "represent a

rational effort to enforce the constitutional guarantee of a speedy trial". In support of this thesis counsel correctly cited "**State v. Packay, 64 Ohio St. 2d 218 (1980).**" (**Brief In Opposition, p. 10.**)

The inescapable conclusion here could only be that these statutes, which (as shown above) were specifically crafted to insure that the constitutional requirement of a speedy trial is adhered to, were seriously violated. To the extent this is so, the rights sought to be protected by these very precise statutes were violated.

Indeed, the fact that our Court of Appeals addressed the issue before it in the context of the petitioners' right to a speedy trial could not be

made any clearer than it was in another quote from the State's **Brief In Opposition**. Here counsel actually credited the Court of Appeals with having addressed the "speedy trial issue" on its merits (id., p. 9).

Here it could not be any clearer that the speedy-trial issue, which was at the heart of the Opinions below, was specifically cast in terms of whether the constitutional right to a speedy trial was waived as to charges not specifically included in the written waiver. See **Appendix to Petition For Writ Of Certiorari**, Appendix "B", pp. A 9 - A 17 and Appendix "D", pp. A 36 - A 45. This being so, even a Hornbook lawyer would know that the right to a speedy trial relates to the right given in, and

protected by, the Sixth Amendment to the United States Constitution.

II

Equally indefensible is the argument by counsel opposite (**Brief In Opposition**, p. 11) that our complaint over the failure of the Court to instruct the jury on a statutory-affirmative defense was not a constitutional issue. In making that argument counsel seems clearly to have ignored the most critical aspect of the contention being made.

Simply put, our position is that the failure of the Court to submit the affirmative defense issue to the jury translates into a finding by the jury that the defense was not made.

We cited in support of this thesis cases which take the position

that it is the duty of the trial court to instruct the jury, as an aspect of due process, on all the issues involved in the case. See **Green v. United States, 405 F.2d 1368, 1370 (D.C. Cir. 1968)** and **United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971)**. Since this was not done here, it follows that the court's failure to instruct the jury on the affirmative defense put forth by one of the petitioners must be regarded as a due process violation.

On the other hand, the argument made by counsel opposite that because the Ohio Courts (i.e., both the trial court and the Court of Appeals) decided the issues herein against the petitioners it must be correct, truly misses its mark. This follows because

there is nothing about the way the courts addressed the issue here involved that shows the court engaged in a studied analysis of the arguments made by the petitioners.

III

In the State's challenge against our sufficiency argument (Argument No. IV) counsel opposite again attempts to gospelize conclusory findings made by the Court of Appeals. The problem with the State's argument, as written (**Brief In Opposition**, p. 12), is that *it fails to evidence even a slight awareness, by the writer, that it is not enough to simply say the evidence was sufficient to carry the day. Surely some effort should have been made to show why this is so.*

So postured, if nothing else, the

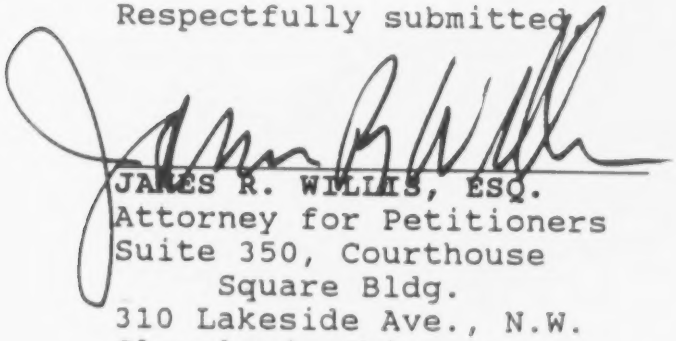
requirements of due process are such that specific proof of a specific crime is still essential. And, regardless of the penchant of a state reviewing court for burying sufficiency challenges under dated cliches that centralize this Court's critical holding in Jackson v. Virginia, 443 U.S. 307 (1979), the constitutional requirement is simply not satisfied by conclusory references to controlling tenets.

CONCLUSION

For all of the reasons argued on behalf of these petitioners certiorari should be granted. And, this to the

end that their causes can be meaningfully reviewed.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioners
Suite 350, Courthouse
Square Bldg.
310 Lakeside Ave., N.W.
Cleveland, Ohio 44113
(216) 523-1100